No. 2915

United States

Circuit Court of Appeals

For the Ninth Circuit.

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CENTRAL CALIFORNIA CANNERIES COMPANY, a Corporation GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANUFACTURING COMPANY, GOLDEN GATE PACKING COMPANY, J. F. PYLE & SON, INCORPORATED, HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY, a Corporation,

Appellants,

vs.

DUNKLEY COMPANY, a Corporation,

Appellee.

NOTICE OF MOTION FOR ORDERS VACATING DECREE AFFIRMING DECREES OF DISTRICT COURT, ETC., AND SHOWING IN SUPPORT OF SAID MOTION.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

FRANCIS J. HENEY,
WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Solicitors and Counsel for Defendants-Appellants.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX.

Index. Page

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2915.

CENTRAL CALIFORNIA CANNERIES COMPANY,

Appellant,

GRIFFIN & SKELLEY COMPANY,

Appellant,

J. C. AINSLEY PACKING COMPANY,

Appellant,

ANDERSON-BARNGROVER MANUFACTURING COMPANY,

Appellant,

GOLDEN GATE PACKING COMPANY,

Appellant,

J. F. PYLE & SONS, INC.,

Appellant,

HUNT BROTHERS COMPANY,

Appellant,

SUNLIT FRUIT COMPANY,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Notice of Motion.

To Dunkley Company, Appellee, and Messrs. Fred L. Chappell and John H. Miller, Its Solicitors and Counsel:

You are hereby notified that on Monday, May 6, 1918, at the hour of 10:30 A. M., as as soon there-

after as counsel can be heard, in the courtroom of the above-entitled court in the United States Post Office and Courthouse Building, in the City and County of San Francisco, California, the above-named appellants will move the Court for the following orders and decrees, and such further, other and additional relief, as to this Honorable Court may appear proper and just in the light of the showing made, to wit:

1. An order and decree vacating and setting aside the order and decree, made and entered herein by this Honorable Court on October 1, 1917, affirming the interlocutory decree of the District Court for the Southern Division of the Northern District of California, made and entered by it on the 8th day of December, 1916, in each of the above-entitled causes.

2. An order and decree reversing, vacating and setting aside the said interlocutory decree made and entered by said District Court on the 8th day of December, 1916, in each of said causes.

3. An order and decree setting aside the order of submission for decision, which was made and entered by said District Court in each of said causes on the 5th day of April, 1916, and reopening the case for further testimony and proof on behalf of appellant.

4. An order permitting appellants to take the depositions of Messrs. Fred L. Chappell, John H. Miller, Samuel Dunkley, Melville E. Dunkley, William F. Burrows, Henry W. Hardy, Philip Larmon, Albert Bettcher, Henry Veeder, and any and

all others who may be shown by the answers of any of the foregoing witnesses to have participated in or to have knowledge of the transaction upon which this motion is based.

5. An order and decree dismissing each of said causes and directing the District Court to make and enter, in each of said causes, a final decree dismissing the bill of complaint therein with costs to the defendant therein.

6. An order that the appellants recover against the appellee for their costs herein expended.

GROUNDS OF MOTION.

Said motion will be based upon the following grounds, to wit:

1. That prior to March 28, 1916, and prior to the commencement of the trial of this cause in said District Court and prior to the decision therein, the plaintiff-appellee sold, assigned and transferred to another corporation all the right, title and interest in and to the United States letters patent No. 1,104,175, being the letters patent sued on herein, together with all its right, title and interest in and to any and all causes of action arising out of, connected with or incident to the ownership of said letters patent No. 1,104,175, which had accrued or arisen prior to such sale, assignment and transfer, and particularly the causes of action sued on herein.

2. That prior to the decision of the District Court herein and prior to the making and entry of the respective interlocutory decrees in said causes by said District Court, the plaintiff-appellee did execute a certain written instrument which bears the

date July 25, 1916, evidencing the sale, assignment and transfer to another corporation of all the right, title and interest in and to United States letters patent No. 1,104,175, being the letters patent sued on herein, and thereafter, to wit, on September 21, 1916, said written instrument was duly filed and recorded in the United States Patent Office at Washington, D. C., at the request of the attorneys for said other corporation assignee.

3. That by reason of the foregoing facts, each of said causes abated at the time of such sale, assignment and transfer and all proceedings had and taken therein subsequent to such sale, assignment and transfer are nugatory.

4. That the defendants-appellants had no knowledge of the aforesaid sale, assignment and transfer by the plaintiff-appellee of the right, title and interest in and to the United States letters patent No. 1,104,175, being the letters patent sued on herein, or of its sale, assignment and transfer of its right, title and interest in and to said, or any of said causes of action herein, at any time prior to the 11th day of April, 1918, when it learned thereof for the first time by having its attention brought to a motion to dismiss which was filed by said plaintiff in another suit then pending between it and another defendant in the United States District Court, Southern District of California, Southern Division, said suit being entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C–8—In Equity," the affidavits and other papers filed by said plaintiff on said motion are

attached to the affidavit of William K. White heretofore filed herein with the clerk of this court in support of appellants' application for a stay of the issuance of the mandates herein.

5. That by reason of its concealment of the foregoing facts from said District Court and from this court and of other vexatious and inequitable conduct on its part, as appears from the records of said District Court and of this court, said plaintiff is not entitled to any relief in a court of equity and therefore the bill of complaint in each of said causes should be dismissed with costs to the defendant therein.

6. That since the 1st day of January, 1918, the defendants-appellants have acquired knowledge of newly discovered evidence from the defendant in the aforesaid case, pending in said District Court for the Southern District of California, which conclusively proves, as defendants are advised by their attorneys, that the testimony of Samuel J. Dunkley, Melville E. Dunkley and H. C. Schau, which was given in the trial of this cause, is not true in substance or effect in relation to the respective dates and times at which the invention covered by said letters patent No. 1,104,175, being the patent sued on herein, was conceived and was embodied in a machine and that such dates and times have been antedated more than one year respectively by such testimony and that the true dates of said conception and of such embodiment in a machine respectively are subsequent to August 3, 1903, the date prior to which the Grier anticipating machines were com-

pleted and put into public and commercial use.

At the hearing of said motion, appellants will rely on and use all the records, pleadings and papers herein; the briefs on file herein; the certified copy of the papers and proceedings filed and taken by the plaintiff-appellee in that certain suit now pending and heretofore brought by the plaintiff-appellee in the United States District Court for the Southern District of California and entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C–8—In Equity," and which certified copy is attached to the affidavit of William K. White heretofore filed herein with the clerk of this court in support of appellee's application for a stay of the issuance of the mandates herein; a certified copy of the assignment of said letters patent in suit to such other corporation and which certified copy is filed herewith and marked Exhibit "A"; and the affidavit of Kemper B. Campbell attached hereto and served herewith.

FRANCIS J. HENEY,
WILLIAM K. WHITE,
FREDERICK S. LYON,
KEMPER B. CAMPBELL,
Solititors and Counsel for Appellants.

Exhibit "A" to Affidavit of Kemper B. Campbell—Assignment, Michigan Canning & Machinery Co., etc., to Dunkley Co., Dated July 25, 1916.

2–391

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, GREETING:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of an instrument of writing

Recorded September 21, 1916,
in
Liber Q–101, page 59.

Said record has been carefully compared with the original and is a correct transcript of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 18th day of April, in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-second.

[Seal] F. W. H. CLAY,
Acting Commissioner of Patents.

Exhibit "A" to Affidavit of Kemper B. Campbell.
J. H. Ardis, Notary Public.

WHEREAS, MICHIGAN CANNING COMPANY (former name Dunkley Company), of Kalamazoo, Michigan, a corporation duly incorporated and existing under the laws of Michigan, did obtain letters patent of the United States for an improvement in Machines for Peeling Peaches and other Fruit, which letters patent are numbered 1,104,175 and bear date the 21st day of July, 1914; and

WHEREAS, said Michigan Canning & Machinery Company is now the sole owner of said patent and of all rights under the same; and

WHEREAS, the Dunkley Company, a corporation duly incorporated and existing under the laws of the State of Michigan, is desirous of acquiring the entire interest in the same;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations to it in hand paid, the receipt of which is hereby acknowledged, the said Michigan Canning & Machinery Company has sold, assigned and transferred and by these presents does sell, assign and transfer unto the said Dunkley Company, the whole right, title and interest in and to the said improvement in Machines for Peeling Peaches and other Fruit, and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said Dunkley Company for its own use and behoof and for the use and behoof of its legal successors and assigns to the full end of the term for which said letters patent are or may be

granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made.

IN WITNESS WHEREOF, the Michigan Canning & Machinery Company has caused this instrument to be executed in its corporate name and in its behalf by its President and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its Secretary, this 25th day of July, 1916.

MICHIGAN CANNING & MACHINERY COMPANY,

By PHILIP LARMON,

President.

Attest: SAMUEL J. DUNKLEY, Secretary.

[Michigan Canning & Machinery Company Corporate Seal Michigan]

State of Illinois,
County of Cook,—ss.

I, Albert Bettcher, a Notary Public in and for said County in the State aforesaid, do hereby certify that Philip Larmon, President of the Michigan Canning & Machinery Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, appeared before me this day in person and acknowledged that he signed and delivered and said instrument as the free and voluntary act of said Michigan Canning & Machinery Company and as his own free and voluntary act as such President, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 25th day of July, 1916.

ALBERT BETTCHER,
Notary Public, Cook County, Illinois.

[Albert Bettcher, Notary Public, Cook County, Ill.]

MW/V.

Recorded September 21, 1916.

Affidavit of Kemper B. Campbell.

State of California,
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, on oath says that he is one of the attorneys for the defendant in that suit in equity in the United States District Court, Southern District of California, Southern Division, entitled Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C–8—In Equity, referred to in the foregoing motion, and as such had direct charge of investigating the testimony given by Samuel J. Dunkley, Melville E. Dunkley and Harvey Schau in the cases in which this motion is made.

That in said suit in Equity C–8 aforesaid, one of the defenses relied upon is that the Dunkley patent is void because the invention of George E. Grier antedated the alleged invention of Dunkley and the use of machines manufactured by said Grier anticipated the invention of said Dunkley.

That in the trial of the suits in which the attached motion is made, evidence was introduced in said suits tending to show that Grier conceived his in-

vention in August, 1902, and disclosed it at that time and it was established by documentary proof and practically conceded by the plaintiff and found by the Court that Grier began the construction of two large commercial machines in April, 1903, and completed them and put them in commercial operation in July and August of that year. That in order to meet the proofs so made, witnesses S. J. Dunkley, Melville E. Dunkley, his son, and Harvey Schau, their employee, took the stand and testified that a model machine was made in 1902 and that peaches were peeled by it at that time; that during the peach season of 1903 a commercial machine was made, which was operated extensively; notwithstanding the fact that during the interference proceedings in the Patent Office said S. J. Dunkley and Melville E. Dunkley had testified that the first or model machine was made in the summer of 1903.

That affiant is informed and believes and therefore states that the testimony of said S. J. Dunkley, Melville E. Dunkley and Harvey Schau to the effect that said experimental model machine was made and operated in the year 1902 and that a commercial machine was made and operated in 1903 was wholly and wilfully false and untrue, and given for the purpose of committing a fraud upon the Court and the people of the United States and of acquiring for this plaintiff rights to which it was not entitled.

That affiant on or about March 23, 1918, returned from a careful investigation covering a period of six weeks' duration, in which he has personally

interviewed a large number of men and women who were employed by said S. J. Dunkley, the alleged inventor, during the years 1902, 1903 and 1904. That some of those interviewed informed affiant that they were present when the original model machine was constructed during the fall of 1903 and subsequent to July of that year and not in 1902 as testified to by the two Dunkleys and Schau, and that said model was first tried out late in October, 1903, and that the first commercial machine was made during the spring of 1904 and first tried out and used during the late summer and fall of 1904. That a large number, to wit, in excess of fifty of said persons employed by said S. J. Dunkley during the years 1903 and 1904 informed affiant that no lye peeling machine of any kind was used commercially by said S. J. Dunkley or by Dunkley Company in the year 1903 and that the first commercial machine was installed and used at South Haven by said S. J. Dunkley, president of the Dunkley Company, 1904, but on the contrary that during the season of 1903 all peaches packed at said South Haven factory were peeled by the use of knives. That affiant procured, during his investigation, numerous photographs of the interior of said factory and numerous documents which in affiant's opinion conclusively establish the falsity of the testimony referred to and given in behalf of plaintiff in this action in the other suits. Affiant further states that of the large number of persons interviewed by him, there was not a single one who stated the facts to be

as said Dunkleys testified in said cases in which this motion is made.

Affiant further says that he is informed and verily believes the facts to be that the Dunkley Company, plaintiff in the cases in which this motion is made, did assign said letters patent in suit to another corporation, together with all rights and claims arising out of past infringement and particularly the *the* causes of action sued on in the cases in which this motion is made, on or about January 12, 1916, and that the records of the plaintiff corporation and of such other corporation will show these facts, and that the witnesses named in the foregoing motion can and will give material testimony to establish this fact and *and* prove that plaintiff in the cases in which this motion is made, had no right, title or interest in or to the letters patent in suit or in or to the causes of action sued on in said cases or in or to any right of action arising out of or accruing from any infringement of said patent, but, on the contrary, entirely parted with and sold all such right, title and interest on or about January 12, 1916.

Affiant further says that counsel for appellants in said cases had no knowledge or information or notice of any such transfer or assignment by plaintiff of any right, title or interest in the patent in suit until on April 11th, 1918, a supplemental motion to dismiss was filed in the United States District Court at Los Angeles, California, in said suit No. C–8 in Equity.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 30th day of April, 1918.

[Seal] J. H. ANDIS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. No. 2915. United States Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley Company, Appellee. Notice of Motion. Filed May 1, 1918. F. D. Monckton, Clerk.

Received a copy of the within this 30th day of April, 1918.

FRED L. CHAPPELL,
Solicitors for Plaintiff Appellee.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2915.

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant,
GRIFFIN & SKELLEY COMPANY,
Appellant,
J. C. AINSLEY PACKING COMPANY,
Appellant,
ANDERSON-BARNGROVER MANUFACTURING COMPANY,
Appellant,

GOLDEN GATE PACKING COMPANY,
Appellant,
J. F. PYLE & SONS, INC.,
Appellant,
HUNT BROTHERS COMPANY,
Appellant,
SUNLIT FRUIT COMPANY,
Appellant,
vs.
DUNKLEY COMPANY,
Appellee.

Affidavit of W. K. White.

State of California,
City and County of San Francisco,—ss.

William K. White, being first duly sworn, says: I am one of the attorneys for the above-named appellants; that prior to May 6, 1918, and noticed for hearing on that day, appellants will file herein a motion for an order and decree vacating and setting aside this Court's decrees affirming the interlocutory decrees of the District Court herein, and also a motion for other and such further relief as to the Court may seem proper and just in the premises:

Said motion will be based, in part, upon the ground that, on July 25, 1916, prior to the decision of the District Court herein, and prior to the making and entry herein by the District Court of said interlocutory decrees, the plaintiff-appellee sold and assigned to another corporation all the right, title and interest in and to the Dunkley patent sued on herein, as ap-

pears from the certified copy of the papers and proceedings filed and taken by the plaintiff-appellee in that certain suit now pending and heretofore brought by the plaintiff-appellee in the United States District Court, for the Southern District of California, and entitled "Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C–8";

Said certified copy of said papers and proceedings is hereto attached and made a part hereof.

WHEREFORE, affiant respectfully prays for an order staying the issuance of the mandates herein to and including May 6, 1918 and, upon the filing of said motion herein prior to said date, staying the issuance of the mandates until said motion is heard and determined by this Honorable Court.

WILLIAM K. WHITE.

Subscribed and sworn to before me this 19th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C–8.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Discontinuance of Suit.

Now comes plaintiff in the above-entitled suit, by John H. Miller, Esq., its attorney, and discontinues and dismisses the said suit with costs to be awarded to the defendant, but without prejudice to the right of the plaintiff to commence a new suit for the same cause of action.

Dated: March 15, 1918.

JOHN H. MILLER,
Attorney for Plaintiff.

[Endorsed]: No. C–8. United States District Court, Southern District of California, Southern Division. Dunkley Company vs. Pasadena Canning Co. Discontinuance of Suit. Filed Mar. 18, 1918. Chas. N. Williams, Clerk. By Geo. W. Fenimore, Deputy Clerk. John H. Miller, Attorney at Law, 723–4–5–6, Crocker Building, San Francisco, Cal., for Plaintiff.

At a stated term, to wit, the January term, A. D. 1918, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the eighteenth day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. C–8—Eq.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Minutes of Court—March 18, 1918—Order Continuing Cause of Dunkley Co. v. Pasadena Canning Co.

This cause coming on this day for the hearing of defendant's motion to file an amended answer herein; Frederick S. Lyon, Esq., appearing as counsel for the defendant; and counsel appearing for Fred L. Chappell, Esq., of counsel for plaintiff, having moved the Court to dismiss this cause without prejudice and with costs; good cause appearing, IT IS ORDERED that this cause be and the same hereby is continued one (1) week, to wit, until Monday, the 25th day of March, 1918, for further argument herein.

United States District Court, Southern District of California, Southern Division.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of Kemper B. Campbell.

State of California,
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, deposes and says: That he is one of the attorneys for defendant in the above-entitled action. That this is an action for an alleged infringement by defendant of a certain patent for a machine for peeling peaches and other fruit, a typical claim in said patent being as follows:

> "In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances."

That during the year 1915 and each season since defendant has used a machine constructed in substantial accordance with U. S. patent 1,168,799 granted to George E. Grier, and had in 1914 discontinued the use of the first type of Grier machine to which patent affiant refers and hereby makes a part of this affidavit. That affiant is informed and

believes and therefore states that the first of said machines used by defendant was invented by G. E. Grier, president and manager of defendant, in the month of August, 1902. That the actual construction of said machine began in the month of April, 1903, and its commercial use commenced in July, 1903, and continued during many successive years thereafter. That said machine consisted of a shaker device for advancing and turning the fruit and nozzles so arranged as to direct sprays or jets of water upon the fruit as it advanced. That said machine comes directly within the terms of the claim quoted and other claims of plaintiff's alleged patent and therefore would anticipate the Dunkley invention if prior in time or would infringe if subsequent, and therefore one of the main questions to be decided in this suit is, who was the first inventor, Grier or Dunkley? That the Dunkley patent was applied for on November 29th, 1904, and issued on July 21st, 1914; that in certain suits brought by plaintiff herein in the District Court of the United States in and for the Northern District of California, Second Division, to wit, Number 201, entitled Dunkley Company vs. Central California Canneries Company, and certain other suits consolidated and heard upon the same testimony, interlocutory decrees were entered against said defendants and affirmed upon appeal by the Circuit Court of Appeals.

That one of the defenses relied upon in said suits and in the case at bar is that the Dunkley patent is void because said first machine, invented and built by G. E. Grier of the Pasadena Canning Company,

the copartnership predecessor in interest of the defendant corporation, antedated the alleged invention of Dunkley. That evidence was introduced in said suits tending to show that Grier conceived his invention in August, 1902, and disclosed it at that time and it was established by documentary proof and practically conceded by the plaintiff and found by the Court that Grier began the construction of two large commercial machines in April, 1903, and completed them and put them in commercial operation in July and August of that year. That in order to meet the proofs so made, witnesses S. J. Dnnkley, Melville E. Dunkley, his son, and Harvey Schau, their employee, took the stand and testified that a model machine was made in 1902 and that peaches were peeled by it at that time; that during the peach season of 1903 a commercial machine was made, which was operated extensively; notwithstanding the fact that during the interference proceedings in the Patent Office said S. J. Dunkley and Melville E. Dunkley had testified that the first or model machine was made in the summer of 1903.

That affiant is informed and believes and therefore states that the testimony of said S. J. Dunkley, Melville E. Dunkley and Harvey Schau to the effect that said experimental model machine was made and operated in the year 1902 and that a commercial machine was made and operated in 1903 was wholly and wilfully false and untrue, and given for the purpose of committing a fraud upon the court and the people of the United States and of acquiring for this plaintiff rights to which it was not entitled.

That affiant has just returned from a careful investigation covering a period of six weeks' duration, in which he has personally interviewed a large number of men and women who were employed by said S. J. Dunkley, the alleged inventor, during the years 1902, 1903 and 1904. That some of those interviewed informed affiant that they were present when the original model machine was being constructed and that said experimental model machine was constructed during the fall of 1903 and subsequent to July of that year and not in 1902 as testified to by the two Dunkleys and Schau, and that said model was first tried out late in October, 1903, and that the first commercial machine was made during the spring of 1904 and first tried out and used during the late summer and fall of 1904. That a large number, to wit, in excess of fifty of said persons employed by said S. J. Dunkley during the years 1903 and 1904 informed affiant that no lye peeling machine of any kind was used commercially by said S. J. Dunkley or by Dunkley Company in the year 1903 and that the first commercial machine was installed and used at South Haven by said S. J. Dunkley, president of the Dunkley Company, in 1904, but on the contrary that during the season of 1903 all peaches packed at said South Haven factory were peeled by the use of knives. That affiant procured, during his investigation, numerous photographs of the interior of said factory and numerous documents which in affiant's opinion conclusively establish the falsity of the testimony referred to and given in behalf of plaintiff in this action in the other suits.

Affiant further states that of the large number of persons interviewed by him, there was not a single one who stated the facts to be as said Dunkleys testified in the case recently tried in the Northern District of California. That more than thirty of said witnesses, including those employed during the years referred to in and about said factory and having knowledge of all methods of peeling peaches therein during the years of 1902, 1903 and 1904, have agreed to come to California to testify in this suit and affiant is informed and believes and therefore states that some of them have already rearranged their business and personal affairs to do so.

That on or about the 24th day of March, 1916, an attempt was made by plaintiff to take the deposition of one Carr, Secretary of the California Fruit Canners Association, and one R. I. Bentley, manager of said corporation. That upon advice of counsel for plaintiff herein, said witnesses and each of them refused to answer certain questions propounded and were cited before Honorable William C. Van Fleet, District Judge; that counsel for plaintiff vigorously resisted the taking of said depositions and in the course of his opposition insisted to the court that said witnesses would be produced to testify in the trial of this case in open court, and in connection with said argument stated to the court and to counsel for defendant as follows, as shown on page 30 of the record of that case:

> "Mr. CHAPPELLE.—The recognizance for the witnesses to appear at Pasadena if there is anything of that kind that will satisfy the re-

quirements of the gentleman, we are willing to furnish that, because we wish the case tried in open court.

"The COURT.—Of course, the assurance of counsel on either side of this case would be sufficient recognizance for me, so far as that is concerned. I do not think that either counsel would represent that certain things would be so unless they were intending to carry it out."

That apparently, in pursuance of said design to try this case in open court, plaintiff has taken no depositions of any witnesses and defendant, relying upon said statement so made by Mr. Chappelle in open court, and realizing the disadvantage to which defendant would be put by submitting its testimony by deposition when plaintiff intended to and insisted upon the production of its witnesses in open court, has been forced to likewise prepare for the production of witnesses to be examined *ore tenus*.

That this case has been pending since the 22d day of December, 1915. That no effort was made to have said case set for trial until on or about the 14th day of November, 1917, on which date one of the attorneys for defendant received from Mr. John H. Miller, attorney for plaintiff, a letter referring to the setting of this case for trial, as follows:

"Our people are anxious to dispose of this case, and would like to have an early trial of the same if you are still disposed to push the defense further. I wish you would let me know what is the earliest day the case can be set for

trial and about what date would suit your convenience."

That upon the call of the calendar on the 11th day of January, 1918, counsel for plaintiff in open court requested and urged an early date of trial, then and there for the first time asserting that the issues between the parties had practically been determined in the suits previously tried in the Northern District. That defendant was informed of said insistence of plaintiff to try this case in open court and was informed of the contents of the letter referred to, and was informed of the representations made by counsel in open court and insistence upon an early trial and immediately upon the setting of the said case instructed affiant to procure and engage such additional counsel as he deemed advisable; that he go to the State of Michigan, taking with him or procuring while there such assistants as were found necessary and thoroughly investigate the truth or falsity of the claims made by plaintiff as based upon the story of the alleged invention of S. J. Dunkley as related in said suits in the Northern District of California. That acting under said instructions affiant engaged additional counsel and obligated the defendant herein for counsel fees in an amount exceeding Fifteen Thousand Dollars. That early in the month of February, 1918, in pursuance of said instructions of G. F. Grier, president of defendant corporation, affiant retained and employed Francis J. Heney, Esquire, now attorney for the Federal Trade Commission of the United States, to conduct the trial of this action. That when said

Francis J. Heney accepted said employment as counsel for defendant, he informed affiant that his present employment would in all probability terminate on or before the first day of April, 1918. That subsequently said Francis J. Heney informed affiant that said Federal Trade Commission desired said Heney to continue his present work for a period subsequent to said first day of April. That affiant, representing defendant, insisted to said Francis J. Heney that he sever his connection, if possible, with the Federal Trade Commission for the time being for the reason that affiant had depended upon the assistance of said Heney and it was then too late to engage other counsel. Affiant is informed and believes that said representations made by affiant were, on or about the —— day of March, 1918, conveyed to the Federal Trade Commission of the United States and it was then arranged that said Francis J. Heney should be released from his present employment for the purposes of the trial of this case.

That in the investigation of the facts of the alleged Dunkley patent, it was found that witnesses had scattered to various parts of the United States and it was necessary to and affiant did hire, to conduct said investigation, a number of assistants who were compelled to travel, in the aggregate, many thousands of miles, costing the defendant a sum in excess of Four Thousand Dollars. That having interviewed these witnesses it is affiant's opinion that many of them, having made arrangements with their present employers and others to be absent in Cali-

fornia for the purpose of this suit, it will be impossible to obtain the testimony of these persons as voluntary witnesses in subsequent litigation.

Affiant further states that several of said witnesses are aged and infirm, particularly, to wit, C. D. Crary of Maywood, Illinois, and Mrs. Hattie Avery of South Haven, Michigan. That in the event of the dismissal or postponement of this cause the testimony of said witnesses will be lost to the defendant; that the testimony to be given by said witnesses is material to the issues in this case; that affiant is informed and believes and therefore states that said C. D. Crary would testify that he was machinery superintendent for said S. J. Dunkley at the factory in South Haven during the year 1902, and that no experimental model peach-peeling machine was made in said factory during that year, and that on the contrary said experimental model peach-peeling machine was made in said factory in the late fall of 1903.

That affiant is informed and believes and on that ground alleges, that Friday Brothers, a copartnership doing business at Coloma, Michigan, by reason of repeated threats of suit made to them by plaintiff, and in order to prevent the annoyance and expense of litigation but without conceding the right of plaintiff in the premises, has been compelled to pay plaintiff royalties in substantial sums for the use of a machine manufactured under defendant's Grier patent No. 1,168,799, and furnished to said Friday Brothers by Anderson-Barngrover Manufacturing Company of California, plaintiff has here-

tofore established the validity of its alleged patent in said litigation in the Northern District of California.

That said machine now in use by defendant and in exclusive use by it since a time prior to the institution of this suit, does not infringe plaintiff's patent and was in no way involved in the suits in the Northern District of California hereinbefore referred to; a copy of the record on appeal of said cases of Central California Canneries Company, a corporation, et al., Appellants, vs. Dunkley Company, a Corporation, Appellee, No. 2915, United States Circuit Court of Appeals for the Ninth Circuit, is hereby made a part of this affidavit for the purpose of this motion.

That witness Carr, whose deposition was attempted to be taken and whose presence at the trial of this cause was promised and guaranteed by plaintiff, has since died and his testimony, material to the issues herein, has been lost to the defendant.

That this suit is of wide and general public interest, for the reason that if plaintiff prevails in this action, and succeeds in forcing its claim of a tribute from the fruit packers of the United States of from three to six dollars per ton of peaches canned, that it will not only result in a monopoly of the peach canning industry but will confer upon plaintiff and the interests behind it, a leverage to effect a monopoly of all other fruits as well. That this case is of vital public interest and therefore should not be dismissed for the reason that it should be promptly determined whether or not such tribute can be exacted, based

upon a patent sustained by false testimony as herein set forth.

That affiant was called back to Los Angeles by a telegram received at Chicago on Tuesday, March 19, 1918, stating that plaintiff had without any notice whatever to defendant herein, made an *ex parte* motion to dismiss this suit without prejudice to its right to bring a new action. That affiant arrived in Los Angeles late on Saturday, March 23, 1918; that he has diligently and at first opportunity prepared for service and filing this and other affidavits to be used upon this motion.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 25th day of March, 1918.

[Seal] C. L. BAGLEY,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. C–8—Eq. United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of Kemper B. Campbell. Filed Mar. 25, 1918. Chas. N. Williams, Clerk. T. F. Green, Deputy. Kemper B. Campbell, Attorney at Law, 810–821 California Building, cor. 2d and Broadway. Phones: Home 60429, Main 2136, Los Angeles, Cal.

In the United States District Court, Southern District of California, Southern Division.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of George E. Grier for Use on Behalf of Defendant in Opposition to Plaintiff's Motion to Dismiss.

State of California,
County of Los Angeles,—ss.

George E. Grier, being first duly sworn, deposes and says:

I am president of the defendant, Pasadena Canning Company, which was incorporated in 1905; and own all of the capital stock thereof, except three shares respectively owned by three others to qualify them to act as directors of said corporation.

In 1902, I and one E. A. Taylor formed a partnership, under the firm name of Pasadena Canning Company, and leased a building in Pasadena, California, wherein, for many years thereafter, said firm conducted a fruit canning business; during the same period, Mr. Taylor was operating the East Side Canning Company, in Los Angeles.

During the peach season of 1902, I conceived a peach-peeling machine and disclosed to others its construction and mode of operation; in April, 1903, I employed one W. H. Finley to build two peach-

peeling machines embodying my invention; these two machines were completed in July, 1903, and one of them, during that month, was commercially, successfully and publicly used in the peeling of peaches at the plant of said Pasadena Canning Company and the use thereof by said firm was continued through the 1903 peach season and for many subsequent seasons thereafter, including the 1914 peach season; the other machine, so completed in July, 1903, was delivered to the East Side Canning Company and its public and commercial use, in the plant of that company in Los Angeles, was commenced at least as early as August 3, 1903.

A photograph disclosing said East Side Canning Company machine is attached hereto and made a part hereof. It has been admitted by plaintiff that each of said machines, which were identical in construction, embodied each and all the respective combinations of elements, and the inventions, respectively covered by all the Dunkley patent claims in issue in this litigation.

At the trial of those certain suits, now pending in the United States District Court for the Southern Division of the Northern District of California, and brought by the plaintiff, Dunkley Company against Central California Canneries Company, Griffin & Skelley Company; J. C. Ainsley Packing Company; Anderson Barngrover Manufacturing Company; Golden Gate Packing Company; J. F. Pyle & Son, Inc.; Hunt Brothers Company; and Sunlit Fruit Company; a large number of witnesses testified regarding my conception, disclosure to others and

reduction to practice of my said invention, embodied in each of said two machines, and the proofs of said facts were so voluminous, elaborate and convincing that the Court stopped the introduction of further proof; furthermore, the opinion of the Court, rendered in said cases, gives full credence to said testimony and proofs, which, I understand, pursuant to the stipulation of the parties in this case, will be filed herein at the hearing of this cause.

On November 23d, 1914, I filed in the United States Patent Office, an application for letters patent on a substantially different type of fruit washer in which no "peeling jets" of water were employed; letters patent No. 1,168,799 were, on January 18, 1916, issued to me upon said application.

In the spring of 1915, at the plant of the defendant, Pasadena Canning Company, the corporation successor in interest of the copartnership firm doing business under the name of Pasadena Canning Company, there was a complete, full-sized commercial machine substantially identical with the machine disclosed in the drawings and described in the specification of my said patent No. 1,168,799.

Some time during the said spring of 1915, Mr. S. J. Dunkley, who, I understood to be and therefore, upon information and belief, state was, at that time the president and representative of the plaintiff, Dunkley Company, telephoned me, at the plant of the defendant, that he was coming out to see me; shortly thereafter, he arrived at the defendants' plant, in Pasadena; while he was at the plant, and

in the presence of two employees of defendant, I exhibited to him said machine, like that disclosed on my patent; I showed all parts of the machine and, in order that he might thoroughly understand its construction and operation, I took some canned whole peaches and, after placing some dust and dirt on them to represent skin, they being peeled peaches, I put them in the machine and operated it to illustrate how the dust and dirt, representing the skin, was removed.

Having theretofore been notified by plaintiff that the machine, built by me in 1903, infringed the Dunkley patent in suit, I immediately after so exhibiting my machine to him on the occasion of his said visit in 1915 and during said visit asked Mr. Dunkley if such machine infringed the said Dunkley patent, and he replied that it did not; however, he said his machine was much superior and that it would pay me to discard my own machine, use his and pay his company the royalty charged by it.

Relying on the said representations of Mr. Dunkley and believing plaintiff would never claim said machine to be an infringement of the Dunkley patent in suit, the defendant, Pasadena Canning Company used said machine throughout the peach season of 1915 and has continued to use said machine during every peach season since said date.

I wish to state further, that the said statement of Mr. Dunkley, regarding my said machine not being an infringement of the Dunkley patent, confirmed a less specific statement made the previous fall by Mr. John H. Miller, one of the plaintiff's attorneys.

At a meeting, in the rooms of the California Canners League in San Francisco, during the fall of 1914 Mr. Miller was asked if a peach-peeling machine, not employing *jets of water,* but only a body of water to remove the disintegrated skin, would infringe the Dunkley patent in suit; he replied he had not examined the Dunkley patent very carefully and, therefore, could not answer positively, but that he thought such a machine would not infringe; as stated before, the machine disclosed in my patent and so exhibited to Mr. Dunkley in the spring of 1915 and which he said did not infringe the Dunkley patent, *does not employ or make use of any peeling jets of water,* as specifically called for by the claims of the Dunkley patent in suit.

In further reliance upon the said representations of Mr. Dunkley as plaintiffs, agent, an exclusive license was issued to the Anderson-Barngrover Manufacturing Company of San Jose, whereby that company, for the life of my patent, was authorized to manufacture and sell machines embodying the invention so disclosed in my patent; under the terms of said license, said company is required to pay a royalty for each machine sold by it and embodying my patented invention; operating under such license, the Anderson-Barngrover Company has made and sold, to various fruit canneries, many of said machines and, defendant has received the said royalties thereon.

That notwithstanding the said representations made by plaintiffs' agent, Mr. S. J. Dunkley, plaintiff thereafter charged my said patented machine to

be an infringement of the Dunkley patent sued on herein and notices to such effect have been given to numerous parties using the same.

I am informed and believe, and upon such information and belief state, that plaintiff, in view of said represenations of its agent and officer, S. J. Dunkley, is estopped from contending or maintaining in this suit, that my said machine infringes the patent in suit; upon information and belief, I further state that, in the event of this suit being dismissed, and said Dunkley patent being assigned to a third party, defendant, in any suit brought against it by such third party for the infringement of said patent, cannot rely on or successfully maintain said estoppel by way of defense; I, therefore, respectfully submit it would be most inequitable to dismiss this suit and, thereby, possibly deprive defendant of the benefits of a defense it now has.

As stated before, the Anderson-Barngrover Company has an exclusive license to manufacture my said patented machines and the defendant herein thereby derives an income, which would be much larger, if plaintiff were not generally charging said machines to be an infringement; that, in said suit of plaintiff against the Anderson-Barngrover Company, an interlocutory decree has been entered adjudging the Dunkley patent valid; the said Anderson-Barngrover Company is, therefore, in any future proceeding instituted against it by plaintiff to have my said patented machine adjudged an infringement, precluded from relying on the defense of invalidity of the Dunkley patent; however, if this suit be not dis-

missed, defendant may be able, and I feel certain will be able, to prove said patent invalid; wherefore, I understand, said Anderson-Barngrover Company, as defendant's agent, can continue to manufacture said machines, without regard to any injunction issued in the suit of plaintiff against it; and, thereby, defendant will be enabled to continue receiving royalties for such manufacture; I, therefore, respectfully submit it would be most inequitable to dismiss this suit and thus prevent defendant establishing its right to make, use and sell my said patented machines and to license others so to do.

Furthermore, the charges of infringement being made by plaintiff against users of peach-peeling machines, operate as a "*cloud" on the rights* of defendant and those engaged in the fruit canning business throughout the country.

Plaintiff contends that *15¢ per bushel is saved* by the use of the invention monopolized by the Dunkley patent in suit "*over and above the old methods and machines open to the public.*" On information and belief, I state, that plaintiffs' attorney, J. H. Miller, in an affidavit filed by him in one of these *Dunkley said:* "On the accounting the appellee will claim the amount of said savings as the profits to be accounted for by the appellants in addition to what damages the appellee may be able to show. At 50 pounds to the bushel, said claim of savings, or *measure of damages,* amounts to $6.00 per ton. I am informed and believe, and therefore say, that the California, 1916, pack of canned peaches amounted to more than 90,000 tons. As machines, employing the lye process

and involving the use of water to remove the disintegrated skins, have been generally used in California, as well as elsewhere, throughout the country, plaintiffs' claims and demands against California canners alone, *for only one year's pack, may amount to $540,000.00.*

In view of the said contentions of plaintiff, it is apparent that the total claims of the plaintiff, against alleged infringers, for the remaining years of the Dunkley patent, amount to millions of dollars.

If the Dunkley patent is not invalidated and plaintiff's said contentions are sustained, such tribute of millions of dollars must be ultimately borne by the consumers of fruit, as the same enters into the cost of producing canned fruit.

The threats of plaintiff to demand and collect of all canners such immense annual tribute operate as a cloud, not only on the defendants' business operations and right to use my said patented machine, but also on the whole fruit canning industry of the United States, as neither defendant nor any other fruit canner, having knowledge of plaintiffs' demands and threats of litigation, can possibly feel safe in continuing its business without taking into account the possible tribute it may be hereafter compelled to pay to plaintiff.

It is therefore apparent that it is vitally necessary for defendant and for the whole fruit canning industry of the country to know, at the earliest possible moment, whether or not, there shall and must be included, in the cost of producing canned fruit, the said immense tribute demanded by plaintiff for the use of

a machine involving the use of lye or similar solution for distintegrating the skin of the fruit and the subsequent use of water to wash off the distintegrated skin.

The early trial of this case and the speedy determination of the validity of the Dunkley patent in suit, *in the light of the further, additional and overwhelming mass of proofs of its invalidity which defendant guarantees to produce at the trial,* are matters of vast importance, not only to defendant, but to the whole nation, which is already too over burdened with the high cost of food to patiently pay tribute to the owner of a patent which, I believe, defendants' proofs will demonstrate was secured and sustained as valid on false testimony.

On information and belief, I state that said plaintiff, by dismissing this suit, hopes to prevent any final or immediate determination of the validity of the Dunkley patent, *in the light of the mass of new evidence defendant has secured and which plaintiffs' representatives know defendant has secured,* and thereby enable plaintiff, through threats, intimidation, and coercion, to effectuate compromises with the various individual canners, thus gradually weakening the opposition to plaintiffs' claims and, at the same time, making it more and more difficult to prove the invalidity of the Dunkley patent.

Said patent was applied for on November 29, 1904; it is therefore, necessary for the defendant, in attacking the validity thereof, to rely on testimony and proofs as to what occurred prior to such date, more than thirteen years ago; that, with the passage of each day, it necessarily becomes more and more diffi-

cult to establish, by oral testimony, what occurred so many years ago in South Haven and Kalamazoo, Michigan, where the Dunkley Company built its first two peach-peeling machines embodying the invention disclosed in the Dunkley patent; with the passage of each day, defendant is confronted with the ever increasing liability and chance of losing, through death or otherwise, the witnesses upon whom it relies to prove what transpired in the Dunkley Company's Michigan establishments in 1902, 1903, and 1904.

Defendant's counsel and others employed to assist them, through months of labor and at an expenditure of thousands of dollars, have, as I am informed and believe, interviewed a large number of people who, at one time or another, worked for the Dunkley Company during the years 1902, 1903 and 1904; on information and belief, I assert that the statements of said people, who were familiar with the facts, are to the effect that the first device, ever made by Dunkley and embodying the invention disclosed in the patent in suit, was his so-called "model machine," and that such model was commence subsequent to July, 1903, and completed and first tested in October, 1903; and that Dunkley's first commercial machine, embodying said invention, was not completed until the middle of 1904 and was first used during the 1904 peach season; in other words, the statements of said numerous persons show that my two anticipating peach machines commenced in April, 1903, and finished in July, 1903, were constructed, completed and publicly and commercially used in Pasadena and Los Angeles, before Dunkley even commenced to build a model device;

in said eight suits, the two Dunkleys, father and son, and a former employee, H. C. Schau testified said model was made in 1902, and the Dunkleys testified the first commercial machine was made in 1903; on information and belief, I assert that defendant's representatives have arranged with from thirty to fifty persons, familiar with various facts pertaining to the construction of said two first Dunkley machines, to come to California to testify in this case in May and, further, that the testimony of said numerous witnesses will demonstrate the falsity of the testimony given by the Dunkleys and Schau in said eight cases and on which testimony, the decision therein was based; I am informed plaintiffs' representatives have full knowledge of the aforesaid facts and, therefore, believe and assert that the sole motive, prompting plaintiff to attempt to dismiss this suit, is to prevent an exposure of the truth and to defeat justice.

If this suit be dismissed, defendant may never be able to prevail on said witnesses or many of them, to come here to testify in any subsequent suit plaintiff may and undoubtedly will bring against defendant, at a time best adapted to suit the aims and ends of plaintiff, and, at a time, best adapted to prevent the truth being disclosed and demonstrated.

In connection with the issuance of said license to the Anderson-Barngrover Manufacturing Company, I neglected to state that, prior to the issuance thereof, I told Mr. W. C. Anderson, the President thereof, about my said conversation with Mr. S. J. Dunkley and his statement that my said machine, covered by my said patent, did not infringe the Dunkley patent

in suit, and I believe and have been informed, that it was, in reliance on said statement, that the Anderson-Barngrover Manufacturing Company accepted said license and engaged upon the manufacture of my said patented machine; that if this suit be dismissed, my said patent is rendered valueless, because no one will desire to purchase a machine of the type disclosed therein in view of plaintiffs' charges of infringement and threats of litigation; in view of the said alleged interference charged by plaintiff to exist between my patent and the Dunkley patent in suit, I respectfully submit defendant is entitled to the affirmative relief of a decisive adjudging that no interference, in fact or law, exists between such patents and to a decisive determining the rights of the parties and the right of others to use my patented machine, I therefore respectfully submit that a dismissal of this suit, will deprive defendant of affirmative relief to which it is entitled under the pleadings and in view of the facts herein set forth.

In order to make the situation clear, I wish to state that defendants' use of the machine, built by me in 1903, was discontinued in 1914 and during the 1915 season and every succeeding peach season, defendant use the machine like that disclosed in my said patent and which does not employ *peeling jets of water* to remove the disintegrated skin; and inspection of the Dunkley patent in suit, shows it is limited to a machine in which such *"peeling jets of water"* are used and the use thereof is an essential feature of such machine; I wish to state further, that in said eight suits heretofore decided, my said patented machine

was not involved and the decisions rendered in said suits in no way relate to the possible infringement of such Dunkley patent by said machine.

GEORGE E. GRIER.

Subscribed and sworn to before me this 25th day of March, 1918.

[Seal] C. L. BAGLEY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. C–8—Eq. In the United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of George E. Grier. Filed Mar. 25, 1918. Chas. N. Williams, Clerk. T. F. Green, Deputy. Kemper B. Campbell, Attorney at Law, 810–821 California Building, cor. 2d and Broadway, Phones: Home 60429, Main 2136, Los Angeles, Cal.

At a stated term, to wit, the January Term, A. D. 1918, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fifth day of March, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. C-8—Eq.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Minutes of Court—March 25, 1918—Order of Submission of Motion for Continuance, etc., in Dunkley Co. v. Pasadena Canning Co.

This cause coming on this day for the hearing of plaintiff's motion for discontinuance, and defendant's motion to amend answer; John H. Miller, Esq., appearing as counsel for plaintiff; N. A. Acker, Esq., and F. S. Lyon, Esq., appearing as counsel for defendant; good cause appearing, IT IS ORDERED that this cause be and the same hereby is continued until 2 o'clock P. M. of this day for the hearing of said motions; and now, at the hour of 2 o'clock P. M., court having reconvened; John H. Miller, Esq., appearing as counsel for plaintiff; Kemper B. Campbell, Esq., N. A. Acker, Esq., and F. S. Lyon, Esq., appearing as counsel for the defendant; on motion of Kemper B. Campbell, Esq., IT IS ORDERED that Francis J. Heney, Esq., and Wm. J. Carr, Esq., be associated with Messrs. Campbell, Acker and Lyon, as counsel for defendants; and argument in support of said motion for discontinuance having been made by counsel for plaintiff, and reply argument having been made by F. S. Lyon, Esq., of counsel for defendant; IT IS

ORDERED that this cause be submitted to the Court on pleadings, argument and authorities cited, for its consideration and decision.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C–8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Notice of Motion to Dismiss Suit.

To Frederick S. Lyon, Kemper B. Campbell, William K. White, F. J. Heney and N. A. Acker, Esqs., attorneys for defendant:

TAKE NOTICE that on Monday, the 15th day of April, 1918, at the opening of court on that day, or as soon thereafter as counsel can be heard, plaintiff in this case will move the above-entitled court at the courtroom thereof in the city of Los Angeles, State of California, that an order be duly made and entered granting the petition and motion of plaintiff for leave to dismiss the above-entitled suit without prejudice to the right of the new Dunkley Company to begin a new suit in said court.

The grounds of the motion are that since the commencement of this suit plaintiff has sold and

assigned the patent sued on to another person not a party to the suit and does not desire to prosecute the suit any further, but said other person desires to file a new suit against defendant for infringement of the patent in suit and another patent issued since the commencement of the above-entitled suit.

Upon the hearing of the motion plaintiff will use, read, and refer to the petition for leave to dismiss and the affidavits of S. J. Dunkley and John H. Miller hereto annexed, and the papers and pleadings on file in the case.

Yours, etc.,
JOHN H. MILLER,
Attorney for Plaintiff.

Los Angeles address: C/o Raymond Ives Blakeslee,
728–29–30 California Bldg.
Dated April 10th, 1918.

Order Shortening Time.

On cause shown ordered that the time for serving these papers be shortened so that the motion may be heard on April 15th, 1918. Copies to be served April 11, 1918.

BLEDSOE,
U. S. District Judge.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C–8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Petition of Plaintiff for Leave to Dismiss the Above-entitled Suit Without Prejudice.

Now comes plaintiff in the above-entitled suit, formerly known as Dunkley Company but now known as Michigan Canning and Machinery Company, and shows to the Court as follows:

1. This suit was commenced on or about December 21, 1915, and on or about January 16th, 1916, the defendant filed its answer.

2. Said answer does not pray for any affirmative relief nor set up any counterclaim or cross-complaint, nor has any counterclaim or cross-complaint ever been filed by defendant.

3. On the calling of the calendar, in January, 1918, the case was set for trial on May 1st, 1918.

4. On or about February 28, 1918, plaintiff through its attorney, received a notice of motion from defendant for leave to file an amendment to its answer, and said motion has not yet been disposed of.

5. On or about January 12, 1916, the name of the plaintiff was changed to Michigan Canning and Machinery Company under and pursuant to the laws of the State of Michigan in that behalf made and provided.

6. On or about January 12, 1916, a new corporation was formed under the laws of the State of Michigan, entitled "Dunkley Company," which said company is not a party to this suit.

7. That on or about July 25th, 1916, Michigan Canning and Machinery Company, formerly known as Dunkley Company, plaintiff herein, sold and assigned the patent in suit to the new Dunkley Company, and ever since said last-named date said new Dunkley Company, not a party to this suit, has been the owner and holder of said letters patent and also of certain other letters patent of the United States, No. 1,237,623, of August 21, 1917, covering the process for peeling peaches by lye.

8. That said two patents are closely related, one being for a machine and the other being for the process of peeling peaches by lye.

9. The present plaintiff, the old Dunkley Company, now known as the Michigan Canning and Machinery Company, no longer has any interest in this case and the patent in suit, and for that reason does not desire to prosecute the suit any longer.

10. The new Dunkley Company, which is not a party to this suit, desires and intends to file a new suit against the Pasadena Canning Company, defendant herein, for infringement of both of said

patents and desires that the two said patents may be tried out and adjudicated at one trial and at one and the same time, thereby saving the necessity of two trials and avoiding much expense.

11. A motion was heretofore made on or about March 25th, 1918, by the plaintiff for leave to dismiss this case and then argued and submitted, but has not yet been decided.

12. Plaintiff intends the present petition and motion to be a continuation of and supplementary to the aforesaid motion of March 25th, 1918, as well as a new and independent motion on additional grounds not advanced at the hearing of the former motion.

WHEREFORE, plaintiff prays that it be allowed to dismiss this case without prejudice to the commencement of a new one by the new Dunkley Company for infringement of the patent in suit and also of patent No. 1,237,623.

Dated April 10th, 1918.

JOHN H. MILLER,
Atty. for Plaintiff.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C–8—IN EQUITY.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of S. J. Dunkley in Dunkley Co. v. Pasadena Canning Co.

State of California,
City and County of San Francisco,—ss.

S. J. Dunkley, being duly sworn, deposes and says: I reside at Kalamazoo in the State of Michigan.

Plaintiff in the above-entitled case, Dunkley Company (which will hereinafter be referred to as the old Dunkley Company), was incorporated under the laws of Michigan in the month of March, 1909, and its articles of incorporation were filed in the office of the Secretary of State of the State of Michigan on March 30, 1909. In and by its articles of incorporation it was stated that the principal places at which the business of the company would be carried on were Kalamazoo, Hartford, Mattewan, South Haven, Grant, Shelby and Frankfort, all in the State of Michigan.

Afterwards on or about January 12, 1916, by a certificate made in due form amending the articles of incorporation, the name of said corporation was changed to that of Michigan Canning and Machinery Company, and such certificate was duly recorded in the office of the Secretary of State of Michigan on January 27, 1916.

A copy of said articles of incorporation and the certificate of amendment changing the name thereof are hereunto annexed, and marked Exhibit "A," and specially referred to and by such reference made a part hereof. A copy of the same duly

certified by the Secretary of State of the State of Michigan will be produced at the hearing.

Afterwards, to wit, on January 12, 1916, another corporation was formed under the laws of the State of Michigan having the name "Dunkley Company," and on or about January 27, 1916, copy of the articles of association of this last-named company was filed in the office of the Secretary of State of the State of Michigan (which said company will hereinafter be referred to as the New Dunkley Company). A copy of the articles of incorporation of this said last-named company is hereunto annexed and marked Exhibit "B," and by such reference made a part hereof. The original articles of association of said company will be produced at the hearing.

Thereafter, to wit, on or about July 25th, 1916, the said Michigan Canning & Machinery Company (being the plaintiff herein after the change of its name from Dunkley Company as aforesaid) by an instrument in writing duly executed and acknowledged, sold, assigned and transferred the whole right, title and interest in and to the said letters patent No. 1,104,175 of July 21, 1914, being the patent sued on, to the said new Dunkley Company, which was incorporated on or about the 12th day of January, 1916, as hereinabove alleged. The said assignment was duly recorded in the Patent Office of the United States on September 21, 1916, in Liber Q 101, page 59, of Transfers of Patents, and ever since said assignment the said new Dunkley Company has been and is now the sole owner

and holder of the said letters patent and of all the rights, liberties and privileges by them granted. A copy of the said assignment is hereunto annexed and marked Exhibit "C."

By virtue of the premises the old Dunkley Company, plaintiff in this case, now known as the Michigan Canning and Machinery Company, has ceased to have any right, title, or interest in the patent sued on or the cause of action sued on, and no longer has any cause of action against the defendant herein, in respect of the matters alleged in the bill.

WHEREFORE, the old Dunkley Company, now known as the Michigan Canning and Machinery Company, desires to dismiss this suit without prejudice to the right of the new Dunkley Company to commence another suit against the Pasadena Canning Company for the same cause of action.

SAMUEL J. DUNKLEY.

Subscribed and sworn to before me this 10th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A"—Articles of Association of Dunkley Company.

We, the undersigned, desiring to become incorporated under the provisions of Act No. 232, of the Public Acts of 1903, entitled "An act to revise and consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any

union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions, and to prescribe the powers and fix the duties and liabilities of such corporations," and the acts amendatory thereof and supplementary thereto, do hereby make, execute and adopt the following articles of association, to wit:

ARTICLE I.

The name assumed by this association, and by which it shall be known in law, is

DUNKLEY COMPANY.

ARTICLE II.

For purpose or purposes of this corporation are as follows:

For the canning, preserving, growing, buying and selling of fruit, vegetables, beans, cereals and their products, also the manufacturing, buying and selling of all materials and supplies used in said business, also the erection and owning, building of factories, warehouses, elevators and operating shipping stations, so far as incident to and necessary to the carrying out of said purpose.

ARTICLE III.

The principal places at which operations are to be conducted are at Kalamazoo, in the county of Kalamazoo, State of Michigan; Hartford, Van Buren Co., Michigan; Mattewan, Van Buren County, Michigan; South Haven, Van Buren Co., Michigan; Grant, Newaygo County, Michigan; Shelby,

Oceana County, Michigan; Frankfort, Benzie County, Michigan.

ARTICLE IV.

The capital stock of the corporation hereby organized is the sum of one hundred twenty-five thousand ($125,000.00) dollars.

ARTICLE V.

The number of shares into which the capital stock is divided is twelve hundred fifty shares of the par value of one hundred dollars each.

ARTICLE VI.

The amount of capital stock subscribed is the sum of eighty thousand ($80,000.00) dollars.

ARTICLE VII.

The amount of said stock actually paid in at the date hereof is the sum of eighty thousand ($80,000) dollars, which amount has been paid in in cash.

ARTICLE VIII.

The office in the State of Michigan for the transaction of business shall be kept at Kalamazoo, Michigan.

ARTICLE IX.

The term of existence of this corporation is fixed at thirty years from the date hereof.

ARTICLE X.

The names of the stockholders, their respective residences and the number of shares of stock subscribed for by each are as follows:

Names	Residence	No. of Shares
F. E. Lewellyn	Shelby, Michigan	390
M. E. Lewellyn	Shelby, Michigan	260
Carl Lans	Shelby, Michigan	150

IN WITNESS WHEREOF, We, the parties hereby associating, for the purpose of giving legal effect to these articles, hereunto sign our names, this 25th day of March, A. D. 1909.

Names	Names
F. E. LEWELLYN	M. E. LEWELLYN

CARL LANS.

State of Michigan,
County of Oceana,—ss.

On this 25th day of March, 1909, before me, a notary public in and for said county, personally appeared F. E. Lewellyn, M. E. Lewellyn, Carl Lans, all of Shelby, Mich., known to me to be the persons named in, and who executed the foregoing instrument, and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

[Seal] C. L. CHURCHILL,
Notary Public.

My commission expires Jan. 23, 1910.
Recorded March 30, 1909. (7 fol.)

CERTIFICATE OF AMENDMENT TO THE ARTICLES OF ASSOCIATION OF THE DUNKLEY COMPANY.

P. O. ADDRESS—Kalamazoo, Michigan.

WE, THE UNDERSIGNED, being the president and the secretary of the Dunkley Company, a corporation existing under the provisions of Act No. 232 of the Public Acts of 1903, do hereby certify, as required by section 17 of said act:

That at a meeting of the stockholders of said cor-

poration expressly called for the purpose of amending its articles of association and held at the office of said company on the 21st day of October, A. D. 1915, it was resolved, by a vote of two-thirds of the capital stock of said corporation, that Articles Nos. I and VIII of the articles of association be and the same are amended so as to read as follows, viz.:

ARTICLE I.

The name assumed by this association, and by which it shall be known in law, is MICHIGAN CANNING & MACHINERY COMPANY.

ARTICLE VIII.

The office in the State of Michigan, for the transaction of business, shall be kept at Kalamazoo, Michigan. The principal office of the corporation shall be located at Room 1200, 76 West Monroe St., in the City of Chicago, Cook County, Illinois.

IN WITNESS WHEREOF we hereunto sign our names this 12th day of January, A. D. 1916.

PHILIP LARMON,
President.

[Corporate Seal]

SAMUEL J. DUNKLEY,
Secretary.

Recorded January 27, 1916. (3 fol.)

Exhibit "B"—Articles of Association of Dunkley Company.

(COMMON AND PREFERRED STOCK.)

We, the undersigned, desiring to become incorporated under the provisions of Act No. 232, of the Public Acts of 1903, entitled "An act to revise and

consolidate the laws providing for the incorporation of manufacturing and mercantile companies or any union of the two, and for the incorporation of companies for carrying on any other lawful business, except such as are precluded from organization under this act by its express provisions and to prescribe the powers and fix the duties and liabilities of such corporations" and the acts amendatory thereof and following articles of association, to wit:

ARTICLE I.

The name of this association, and by which it shall be known in law, is

DUNKLEY COMPANY.

ARTICLE II.

The purpose or purposes of this corporation are as follows:

To manufacture, deal in, build, install, prepare, buy, sell, lease exchange or otherwise acquire or dispose of all kinds of machinery and also all accessories, apparatus and appliances which may be used for or in connection with the canning or preserving of fruits, vegetables and cereals and the products thereof, and all other food products; and also to can, preserve or otherwise prepare for use as food, all kinds of fruits, vegetables and cereals and all other food products.

ARTICLE III.

The principal place at which operations are to be conducted is at Kalamazoo in the county of Kalamazoo, State of Michigan.

ARTICLE IV.

The capital stock of the corporation hereby organ-

ized is the sum of $300,000.00 *dollars,* of which $200,000.00 *dollars* shall be common stock, and *$100,00.00 dollars* shall be preferred stock. The preferred stock shall be subject to redemption at par on the 1st day of July, A. D. 1945 or at any time prior thereto in the discretion of the directors at 105% and the holder shall be entitled to a dividend of 7 per cent per annum, payable quarterly at such times as the directors shall determine which shall be cumulative and payable before any dividend shall be set apart or paid on the common stock. The preferred stockholders shall not be entitled to vote for directors, nor at any meeting of the stockholders of said corporation except as may be provided by statute.

ARTICLE V.

The number of shares into which the capital stock is divided is 3000 of the par value of $100.00 *dollars* each.

ARTICLE VI.

The amount of common stock subscribed is $200,000.00 *dollars.* The amount of preferred stock subscribed is $40,000.00 *dollars.*

ARTICLE VII.

The amount of common stock actually paid in is the sum of Two Hundred Thousand ($200,000) dollars, of which no dollars has been paid in cash, and Two Hundred Thousand ($200,000) dollars has been paid in other property, an itemized description of which, with the valuation at which each item is taken, is as follows, viz.:

Letters patent of the United States issued to Mel-

ville E. Dunkley for an improvement in cherry stemming machines, which letters patent are numbered 1,029,918, and bear date the 18th day of June, in the year 1912. Said letters patent have been assigned to the corporation and are assignable by it.

The amount of preferred stock actually paid in is the sum of $40,000.00 *dollars* of which $4,000.00 has been paid in cash.

ARTICLE VIII.

The office in the State of Michigan, for the transaction of business shall be kept at Kalamazoo, Michigan.

The principal office of the corporation shall be located at Room 1200, No. 76 West Monroe Street, Chicago, Illinois.

ARTICLE IX.

The term of existence of this corporation is fixed at thirty years from the date hereof.

ARTICLE X.

The names of the stockholders, their respective residences, and the number of shares of stock subscribed for by each are as follows:

Names.	Residence.	No. of Shares. Common.	Preferred.
William F. Burrows,	4847 Woodlawn Avenue, Chicago, Ill.		400
Samuel J. Dunkley,	111 South West St., Kalamazoo, Mich.	1	
Melville E. Dunkley,	111 South West St., Kalamazoo, Mich.	1999	

IN WITNESS WHEREOF, We, the parties hereby associating, for the purpose of giving legal effect to these articles, hereunto sign our names, this 12th day of January, A. D. 1916.

Names.	Names.
William F. Burrows.	
Samuel J. Dunkley.	
Melville E. Dunkley.	

State of Michigan,
County of Kalamazoo,—ss.

On this twelfth day of January, 1916, before me, a notary public in and for said county, personally appeared Samuel J. Dunkley and Melville E. Dunkley, known to me to be the persons named in, and which executed the foregoing instrument, and severally acknowledged that they executed the same freely and for the intents and purposes therein mentioned.

FRED G. STANLEY,
Notary Public,
Kalamazoo County, Michigan.

My commission expires July 11, 1917.

State of Illinois,
County of Cook,—ss.

On this thirteenth day of January, 1916, before me, a notary public in and for said county, personally appeared William F. Burrows, known to me to be the person named in, and who executed the foregoing instrument and *severally* acknowledged that *they* executed the same freely and for the intents and purposes therein mentioned.

[Seal] ALBERT BETTCHER,
Notary Public.

My commission expires July 29, 1917.

State of Illinois,
County of Cook,—ss.

William F. Burrows, being duly sworn, does depose and say that he is one of the organizers of the DUNKLEY COMPANY WHOSE articles of association are hereto attached; that he knows the property described in article seven of such articles of association and taken in payment for capital stock, and that the same has been actually transferred to such corporation, and further says that said property is of the actual value of Two Hundred Thousand ($200,000) dollars. And further says not.

(Signed) WILLIAM F. BURROWS.

Subscribed and sworn to before me this 13th day of January, 1916.

[Seal] ALBERT BETTCHER,
Notary Public.

My commission expires July 29, 1917.

State of Michigan,
County of Kalamazoo,—ss.

Samuel J. Dunkley and Melville E. Dunkley, being duly sworn, do depose and say that they are two of the organizers of the DUNKLEY COMPANY whose articles of association are hereto attached; that they know the property described in article seven of such articles of association and taken in payment for capital stock, and that the same has been actually transferred to such corporation, and further say that said property is of the actual value

of Two Hundred Thousand ($200,000) dollars. And further say not.

SAMUEL J. DUNKLEY.
MELVILLE E. DUNKLEY.

Subscribed and sworn to before me this 12th day of January, A. D. 1916.

FRED G. STANLEY,
Notary Public.

My commission expires July 11, 1917.

[Endorsed]:

(Common and Preferred Stock.)

ARTICLES OF ASSOCIATION

OF

DUNKLEY COMPANY.

Under Act No. 232, Public Acts of 1903.

Department of State,
Lansing, Mich.

Received for Record the 27th day of Jan., A. D. 1916, and recorded in record of Corporations No. 157 on page 403.

C. C. VAUGHAN,
Secretary of State.

County Clerk's Office,
Kalamazoo, Michigan,—ss.

Received for Record the 8th day of Feb., A. D. 1916, and recorded in Record of Corporations No. 6 on page 109.

EDWARD F. CURTINIOUS,
County Clerk.

Exhibit "C," Assignment, Michigan Canning & Machinery Co. to Dunkley Co.

WHEREAS, MICHIGAN CANNING & MACHINERY COMPANY (former name Dunkley Company), of Kalamazoo, Michigan, a corporation duly incorporated and existing under the laws of Michigan, did obtain letters patent of the United States for an improvement in Machines for Peeling Peaches and other Fruit, which letters patent are numbered 1,104,175 and bear date the 21st day of July, 1914; and

WHEREAS, said Michigan Canning & Machinery Company is now the sole owner of said patent and of all rights under the same; and

WHEREAS, the Dunkley Company, a corporation duly incorporated and existing under the laws of the State of Michigan, is desirous of acquiring the entire interest in the same;

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations to it in hand paid, the receipt of which is hereby acknowledged, the said Michigan Canning & Machinery Company has sold, assigned and transferred, and by these presents does sell, assign and transfer unto the said Dunkley Company, the whole right, title and interest in and to the said improvement in Machines for Peeling Peaches and other Fruit, and in and to the letters patent therefor aforesaid; the same to be held and enjoyed by the said Dunkley Company for its

own use and behoof and for the use and behoof of its legal successors and assigns to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by it had this assignment and sale not been made.

IN WITNESS WHEREOF, the Michigan Canning & Machinery Company has caused this instrument to be executed in its corporate name and in its behalf by its President and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its Secretary, this 25th day of July, 1916.

MICHIGAN CANNING & MACHINERY COMPANY.

By PHILIP LARMON,
President.

[Seal] Attest: SAMUEL J. DUNKLEY,
Secretary.

State of lllinois,
County of Cook,—ss.

I, Albert Bettcher, a notary public in and for said County in the State aforesaid, do hereby certify that Philip Larmon, President of the Michigan Canning & Machinery Company, personally known to me to be the same person whose name is subscribed to the foregoing instrument as such President and to be such President, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as the free and voluntary act of said Michigan Canning & Machinery Company and as his own free and voluntary act as such President,

for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 25th day of July, 1916.

[Notary Seal] ALBERT BETTCHER,
Notary Public, Cook County, Illinois.

Recorded September 21, 1916, U. S. Patent Office, Liber Q 101, page 59 of Transfers of Patents.
MW/V.

In the Southern Division of the United States District Court for the Southern District of California, Southern Division.

No. C–8—IN EQUITY.

DUNKLEY COMPANY,
Plaintiff,

vs.

PASADENA CANNING COMPANY,
Defendant.

Affidavit of John H. Miller.

State of California,
City and County of San Francisco,—ss.

John H. Miller, being duly sworn, deposes and says: I am the attorney of record for the plaintiff in the above-entitled suit. Heretofore on or about March 25th, 1918, on behalf of plaintiff, I made a motion before the above-entitled court for leave to dismiss this suit, and the said motion was then and there argued and submitted. At that time I did not know and since the submission of said motion I have learned that on or about January 12, 1916, the name

of the plaintiff company was changed to that of Michigan Canning and Machinery Company, and that on or about July 25, 1916, said Michigan Canning and Machinery Company sold and assigned the patent in suit to another company not a party to this suit, named Dunkley Company, incorporated under the laws of the State of Michigan in January, 1916. If I had known of these facts at the time of the argument of the former motion I would have notified the Court thereof, but I was not informed of said facts at that time. On April 1, 1918, I was informed of these facts by a telegram from Chicago, and on April 8th I received the formal papers establishing the facts, copies of which said papers are annexed to the affidavit of S. J. Dunkley herewith filed.

It is not the intention of the new Dunkley Company to abandon the cause of action sued on herein, but it is the intention of said new Dunkley Company to begin a new suit in this court against the Pasadena Canning Company for infringement of Patent No. 1,104,175 and to join therewith another cause of action against the defendant herein for infringement of another patent owned by the new Dunkley Company, letters patent No. 1,237,623 of August 21, 1917, this last-named patent having been issued after the commencement of the present suit.

It is the intention of the new company to file this new suit at the earliest practicable moment to the end that both of said patents above mentioned may be tried out and adjudicated in one and the same case, thereby avoiding the necessity of having two trials. This second Dunkley patent, viz., No.

1,237,623, is for a process of peeling peaches by lye, whereas the first Dunkley patent, No. 1,104,175, is for a machine for peeling peaches by lye. The two patents are closely related to each other and it is to the interest of the new Dunkley Company that the two patents should be adjudicated at one and the same time without the necessity of separate trials, thereby saving both time and expense.

In the answer of the defendant, heretofore filed in the above-entitled case, no affirmative relief has been asked nor has any counterclaim or cross-complaint been filed, nor has any right accrued to the defendant which would be prejudiced by a dismissal of the suit at this time, so far as this affiant is aware. There is still pending before this court a motion by defendant for leave to amend its answer, but no affirmative relief is asked by the amendment.

JOHN H. MILLER.

Subscribed and sworn to before me this 9th day of April, 1918.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Service of the within motion to dismiss suit and affidavits in support thereof admitted this 11th day of April, A. D. 1918.

KEMPER B. CAMPBELL,
FREDERICK S. LYON et al.,
Attorneys for Defendant.

No. C–8. United States District Court, Southern District of California, Southern Division. Dunkley

Company vs. Pasadena Canning Co. Notice of Motion and Motion to Dismiss Suit and Affidavits in Support Thereof. Filed Apr. 11, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. John H. Miller, Attorney at Law, 723–4–5–6 Crocker Building, San Francisco, Cal., for Plaintiff.

United States District Court, Southern District of California, Southern Division.

DUNKLEY COMPANY,

Plaintiff,

vs.

PASADENA CANNING COMPANY,

Defendant.

Affidavit of Kemper B. Campbell.

State of California,
County of Los Angeles,—ss.

Kemper B. Campbell, being first duly sworn, deposes and says: That he is one of the attorneys of record for the defendant in the above-entitled suit; that this suit has been pending in this court since December 21, 1915; that at the call of the trial calendar in this court on the second Monday in January, 1918, plaintiff was represented in court by counsel and when this cause was called upon the calendar, stated that plaintiff desired the case set for an early and immediate trial and suggested that it be set early in April; that after hearing counsel for both sides, the Court set this case for trial on May 1st, 1918; that in the case of the same plaintiff against Central

California Canneries and the same plaintiff against certain other defendants in which interlocutory decrees were entered in the United States District Court for the Northern District of California, ordering an injunction on December 8th, 1916, plaintiff in this case, after the entry of said interlocutory decrees, moved said Court for an increase of the supersedeas bonds in each of said cases and thereafter filed motions for increase of said supersedeas bonds in the United States Circuit Court of Appeals, for the Ninth Circuit in two of said cases, notwithstanding the fact that the plaintiff in this case as it now appears from the affidavit of Samuel J. Dunkley herein, had prior to the entry of such interlocutory decrees and prior to the decision of any of said causes by the District Court, transferred the legal title to the patent in suit to another corporation and had divested itself of all right to equitable relief, and pursuant to such policy of prosecuting said cases and this case as though plaintiff were still entitled to equitable relief herein and intended to force the trial of this case, plaintiff moved the setting of this case for trial as aforesaid.

That relying upon the representations of plaintiff and plaintiff's counsel at the time of asking that this be set for trial, defendant has to date incurred expenses for attorneys' fees, witness' fees, taking of depositions, investigations, et cetera, and other expenses necessarily incidental to preparation for said trial, a sum in excess of Twenty-nine Thousand Dollars ($29,000.00), all of which has been incurred by defendant by reason of the vexatious proceedings

and conduct of plaintiff and plaintiff's attorneys in this cause after plaintiff had transferred the title to said patent as set forth in the motion filed by plaintiff herein.

That prior to the filing of the last Notice of Motion to Dismiss and the affidavits accompanying the same, and prior to any notice to defendant of the alleged assignment of the patent in suit, defendant has caused to be taken in the State of Michigan a number of depositions for use in the trial of this action; that in the taking of said depositions, defendant was represented by an attorney who was sent to the State of Michigan from the State of California for the purpose of taking said depositions; that plaintiff was also represented in the taking of said depositions by Fred L. Chappell, Esquire, leading counsel for plaintiff and also counsel for the alleged new Dunkley Company and apparently acting for both corporations.

KEMPER B. CAMPBELL.

Subscribed and sworn to before me this 15th day of April, 1918.

[Seal] J. H. ARDIS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Original. In Equity — No. C–8. United States District Court, Southern District of California, Southern Division. Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant. Affidavit of Kemper B. Campbell. Filed Apr. 15, 1918. Chas. N. Williams, Clerk. Geo. W. Fenimore, Deputy. Kemper B. Campbell, Attorney at

Law, 810–821 California Building, cor. 2d and Broadway, Phones: Home 60429, Main 2136, Los Angeles, Cal.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of each of the original papers filed, or minute orders made and entered, as follows, to wit: Discontinuance of Suit, filed March 18th, 1918; Minute Order made and entered March 18th, 1918; Affidavit of Kemper B. Campbell, filed March 25th, 1918; Affidavit of George E. Grier, filed March 25th, 1918; Minute Order made and entered March 25th, 1918; Notice of Motion to Dismiss Suit and Petition of Plaintiff for Leave to Dismiss Suit Without Prejudice, with affidavit and exhibit attached, filed April 15th, 1918, and Affidavit of Kemper B. Campbell, filed April 15th, 1918; all in the cause entitled Dunkley Company, Plaintiff, vs. Pasadena Canning Company, Defendant, No. C–8—Equity, Southern Division, as the same remains on file and of record therein.

ATTEST my hand and the seal of said District Court, this 16th day of April, A. D. 1918.

[Seal] CHAS. N. WILLIAMS,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: No. 2915. U. S. Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley

Company, Appellee. Affidavit of W. K. White. Filed Apr. 19, 1918. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2915.

CENTRAL CALIFORNIA CANNERIES COMPANY,

Appellant,

GRIFFIN & SKELLEY COMPANY,

Appellant,

J. C. AINSLEY PACKING COMPANY,

Appellant,

ANDERSON-BARNGROVER MANUFACTURING COMPANY,

Appellant,

GOLDEN GATE PACKING COMPANY,

Appellant,

J. F. PYLE & SONS, INC.,

Appellant,

HUNT BROTHERS COMPANY,

Appellant,

SUNLIT FRUIT COMPANY,

Appellant,

vs.

DUNKLEY COMPANY,

Appellee.

Order Staying Issuance of Mandates.

On the affidavit of William K. White and other good cause shown, it is hereby

ORDERED, that the issuance of the respective mandates in the above-entitled suits, and of each of them, be and is hereby stayed to and including May 6, 1918, and,

In the event of the filing herein, before said 6th day of May, 1918, and noticed for hearing on said date, of the motion referred to in said affidavit, it is further

ORDERED that the issuance of said mandates and of each of them, be stayed until said motion is passed on and decided by the Court.

Dated April 19, 1918.

WM. W. MORROW,
W. H. HUNT,
Circuit Judges.

[Endorsed]: No. 2915. U. S. Circuit Court of Appeals for the Ninth Circuit. Central California Canneries Company et al., Appellants, vs. Dunkley Company, Appellee. Order Staying Issuance of Mandates. Filed Apr. 19, 1918. F. D. Monckton, Clerk.